

Adhikari (Migration) [2022] AATA 102 (17 January 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Nirendra Adhikari Mrs Manisha Tiwari Adhikari Master Amartya Adhikari
CASE NUMBER:	2012001
HOME AFFAIRS REFERENCE(S):	BCC2018/5304358
MEMBER:	Andrew George
DATE:	17 January 2022
PLACE OF DECISION:	Darwin
DECISION:	The Tribunal remits the applications for Skilled Regional Sponsored (Provisional) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 489 - Skilled - Regional (Provisional) visas: • Public Interest Criterion 4020 for the purposes of cl 489.211 of Schedule 2 to the Regulations

Statement made on 17 January 2022 at 5:36pm

CATCHWORDS

MIGRATION – Skilled Regional Sponsored (Provisional) (Class GK) visa – Subclass 489 Skilled - Regional (Provisional) – position of Sales and Marketing Manager – bogus document – notice of employment contract while employer was bankrupt – compassionate circumstances – impact on current employer – indispensable employee – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2, cl 489.211; Schedule 4, Public Interest Criterion 4020; rr 1.03, 1.12*

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 8 July 2020 to refuse to grant the applicants Skilled Regional Sponsored (Provisional) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 27 November 2018. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 489.211 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because of the submission of an alleged 'bogus document'.
5. This matter was initially listed for 19 October 2021 but was adjourned to 2 December 2021 at the applicant's request. The applicant appeared in-person and was represented by Fairfield's Lawyers, who appeared by telephone. The substance of the applicant's evidence was contained in a statement dated 30 November 2021. The applicant was granted leave following the hearing to submit further material. He did so on 17 December 2021. This material included post-hearing submissions, written references from Mr George Vazanellis and Ms Irena Gerakios of Jupitour (both of whom had made themselves available at the hearing), and a copy of the applicant's current employment contract.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 489.211 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
12. The alleged 'bogus document' was a letter dated 5 November 2018 from the Director of Python Technologies certifying that the applicant had been contracted to work as an accountant for 20 hours per week from 3 July 2017 to 3 July 2018. It is not in contest that Python Technologies was bankrupt from 14 November 2017.¹
13. In his statement, the applicant wrote:
 14. *"While I was doing work for Python Technologies [Name withheld], I was not aware of his financial position, however I understood that his business was actively operating at the time. I understand and accept that the evidence that I provided to prove my employment was not sufficient and hence was application was refused. Now, I regret and apologise that I have claimed that experience with insufficient evidence to benefit my migration application. I want to confirm that I have submitted all documents in good-faith, and they were obtained from my previous employer where he had provide these documents to me, thereby they were authentic."*
15. The Tribunal accepts this evidence, save that it does not accept that the alleged 'bogus document' was authentic in all respects. It was authentic insofar as it came from Python Technologies, but its contents were false and misleading in a material particular as Python Technologies was not lawfully trading at the time as it was bankrupt. There is an element of deception in this document perpetrated by its author.
16. The evidence before the Tribunal is that the applicant was unaware of the false and misleading nature of this document as at the date of application, but readily admitted as much when the made aware of the bankruptcy of Python Technologies by the Department. The Tribunal so finds and, nevertheless, the applicant does not meet PIC 4020(1).

¹ Letter dated 1 October 2019 from Ms Jia Wang to the Department of Home Affairs.

Should the requirements of PIC 4020(1) be waived?

17. The requirements of PIC 4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
18. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
19. For the following compelling reasons, the Tribunal is satisfied that the requirements should be waived.
20. The applicant was supported during the hearing by both Mr Vazanellis and Ms Gerakios of Jupitur, which runs the business iStore Self Storage. After giving their oral evidence, the Tribunal gave both witnesses an opportunity to engross their evidence through written references. These references are comprehensive and paint a picture of the applicant in irresistibly favourable terms.
21. Mr Vazanellis, an Australian citizen, is the applicant's current employer. Mr Vazanellis' evidence is that the applicant was employed as a Sales and Marketing Manager after an exhaustive selection process in 2019. This position is regarded as a 'hard to fill job' by the Northern Territory Government.
22. Over the past three years, the applicant's bookkeeping and cash handling skills have been of great benefit to the business. He is employed in a significant position of trust. The applicant is also responsible for the management of security. His social media marketing skills have been of significant benefit to the business. The applicant works with minimal supervision, particularly in the absence of Mr Vazanellis. Indeed, Mr Vazanellis regards the applicant as an indispensable employee. This is corroborated by Ms Gerakios, the Accounts Administrator, who regards the applicant as an integral part of the business such that the business would suffer a great detriment were the applicant to leave.
23. The Tribunal places weight on the advice of the Northern Territory Government that a Sales and Marketing Manager is a 'hard to fill job'. It also places weight on the indispensability of the applicant to his employer. Accordingly, the Tribunal is irresistibly moved to be satisfied that compelling circumstances arise that affect the interests of an Australian citizen, namely Mr Vazanellis, that justify the granting of the visa. Having regard to those circumstances, the requirements of PIC 4020(1) should be waived and the Tribunal exercises its discretion in that regard.

Has the applicant satisfied the identity requirements?

24. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal has before it a copy of the applicant's passport issued by the Government of Nepal, expiring on 6 December 2020. From this document, the Tribunal is satisfied as to the applicant's identity and he therefore meets PIC 4020(2A).

Has a visa previously been refused based on a failure to satisfy PIC 4020(2A)?

25. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
26. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A). Therefore PIC 4020(2B) is met.
27. Based on the above, the applicant satisfies PIC 4020 for the purposes of cl 489.211.

DECISION

28. The Tribunal remits the applications for Skilled Regional Sponsored (Provisional) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 489 - Skilled - Regional (Provisional) visas:
 - Public Interest Criterion 4020 for the purposes of cl 489.211 of Schedule 2 to the Regulations

Andrew George
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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